

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONICA MASON,

Defendant-Appellant.

UNPUBLISHED

August 13, 2002

No. 232020

Wayne Circuit Court

LC No. 00-006401

Before: Murray, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right her bench convictions for attempted assault with a dangerous weapon, MCL 750.82; MCL 750.92, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to a prison term of ten months to two years for the attempted felonious assault conviction and to a mandatory two-year term for the felony-firearm conviction. We affirm.

Defendant first contends that the evidence presented was insufficient to support the felony-firearm conviction. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The underlying felony in this case is attempted felonious assault, MCL 750.82; MCL 750.92, which requires proof that the defendant intended, while armed with a dangerous weapon, to cause the complainant to reasonably fear an immediate battery. *People v Jones*, 443 Mich 88, 100-101; 504 NW2d 158 (1993).¹

The testimony of both the complainant and defendant established that defendant’s boyfriend pushed the complainant, jumped on his back, and gave him a bloodied lip. The

¹ A defendant can be convicted of attempted felonious assault even though the evidence shows a completed felonious assault. *Jones, supra* at 103-104.

complainant further testified that defendant encouraged her boyfriend to commit this battery by telling him to get out of the car and “Beat this b---h’s a--.” The complainant then testified that defendant pointed a gun at him from her seat in the car and said, “Should I shoot him, should I shoot the b---h, should I shoot the b---h?” Finally, the complainant stated that he was afraid that he was going to be shot, so he threw the man off his back and ran away.² This testimony was sufficient for a reasonable factfinder to find that the elements of attempted felonious assault and felony-firearm were established beyond a reasonable doubt.³

Defendant next argues that the trial court applied an erroneous aiding and abetting standard in finding defendant guilty of felony-firearm. Defendant did not raise this issue at trial and, therefore, this Court may review only for plain error. To avoid forfeiture, the error must be plain, i.e., clear and obvious, and affect the defendant’s substantial rights, i.e., the error affected the outcome of the proceedings. Once the defendant satisfies these requirements, this Court may reverse only when the plain forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, evidence was presented to support the trial court’s finding that defendant had possession of the gun during the underlying felonious assault. Because the court did not use an aiding and abetting theory to convict defendant of felony-firearm, defendant has failed to show a plain error that affected her substantial rights.

Last, defendant argues that she was denied the effective assistance of trial counsel because of counsel’s failure to make a pretrial motion to quash the felony information, counsel’s failure to object to the allegedly erroneous aiding and abetting standard, and counsel’s failure to enumerate the elements that the prosecutor had to prove to support defendant’s conviction. Because defendant failed to move for a *Ginther*⁴ hearing or a new trial on the basis of ineffective assistance of counsel, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of the counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel’s unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

² The fact that no gun was recovered or introduced as evidence at trial does not mean, as defendant contends, that there was no evidence that defendant was in possession of a gun when the complainant was assaulted. Circumstantial evidence and reasonable inferences arising from that evidence can be used to establish the elements of a crime. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

³ Although defendant denied pointing a gun at the complainant and saying anything to encourage her boyfriend to attack the complainant, questions of credibility are left to the trier of fact. *Avant*, supra at 506.

⁴ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The record does not support defendant's alleged claims of ineffective assistance of counsel. First, it would have been futile for counsel to move to quash the felony information because of an illegal arrest arising from an illegal search because the sanction for an illegal arrest is suppression of evidence seized, not the dismissal of the charges against the defendant. *People v Burrill*, 391 Mich 124; 214 NW2d 823 (1974); *People v Chambers*, 195 Mich App 118; 489 NW2d 168 (1992). No physical evidence was introduced at trial. Second, the court was sitting as the trier of fact and was fully aware of the elements of attempted felonious assault and felony-firearm. Thus, counsel's failure to articulate the elements of the crime did not cause her performance to fall below an objective standard of reasonableness under prevailing professional norms. Likewise, counsel's failure to object to the allegedly erroneous application of general aiding and abetting principles did not constitute ineffective assistance of counsel because the court did not convict defendant of felony-firearm under an aiding and abetting theory.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell